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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 472

THE UNITED STATES,
Petitioner,

v.

FEHLHABER CORPORATION,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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OCTOBER, 1957.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Opinions Below

The opinion of the Court of Claims in this case is reported at 151 Fed. Supp. 817 and appears as an Appendix at pages 14-87 to the Petition for Writ of Certiorari.

However, the petition in this case is in reality directed at the opinion of the Court of Claims in *Volentine and Littleton* v. *United States*, 145 Fed. Supp. 952, decided November 7, 1956,[1] where the Court of Claims sets forth its views with respect to the effect of the Wunderlich Act (Act of May 11, 1954, 68 Stat. 81; 41 U. S. C. Supp. IV, 321-322).

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[1] The *Volentine and Littleton* case finds prominent mention in Footnote 2, p. 6 of the Petition; Footnote 6, pp. 9-10 of the Petition.

In the *Volentine and Littleton* case, the contract sued upon contained a disputes clause. A dispute concerning extra costs and remission of liquidated damages was decided adversely to the contractor by the Corps of Engineers Claims and Appeals Board. The plaintiff-contractor instituted suit in the United States Court of Claims, alleging that the denial of its claim had been arbitrary and fraudulent. At the trial, evidence was offered to support these allegations, but the plaintiff did not offer the transcript of testimony taken before the Board. The Government, without offering testimony of its own, argued that the case should be dismissed because the Court of Claims, under the Wunderlich Act, was limited to a review of the evidence produced before the Board. The court overruled the Government's position, but granted the Government the opportunity to offer testimony on the merits,[2] which the Government elected to do. Presumably because the *Volentine and Littleton* decision was not a final decision, a writ of certiorari was not applied for.

The *Volentine and Littleton* decision took the form of a majority opinion of three judges, a concurring opinion which agreed with but supplemented the majority opinion, and one dissenting opinion. The opinion in the present case granting respondent relief is an unanimous opinion but was written by the same Judge who wrote the dissenting opinion in the *Volentine and Littleton* case, and in the present case his dissatisfaction with the views of the majority in that case is noted. As this Court will have to examine the *Volentine and Littleton* decision to understand the majority view of the Court of Claims on the issues involved in the present case, the opinion is printed as an appendix to this brief, *infra*, pp. 33 to 45.

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[2] 145 Fed. Supp. 952, 954-955.

Statement

Respondent's contract with petitioner called for the construction of the substructure of a bridge, and therefore necessitated excavation. This contract contained a changed conditions clause which entitled respondent to an equitable adjustment in the contract price if in the performance of its work respondent encountered subsurface conditions materially different from those which had been shown on the contract documents.[3] The contract also included a disputes clause extending to the head of the department the right to finally determine disputed questions of fact.[4]

Respondent in the performance of its work encountered areas of sandstone where none had been shown on the contract drawings, which sandstone constituted a subsurface condition materially different from the subsurface conditions that had been indicated by the logs of borings on the contract drawings.[5] The Contracting Officer, who was empowered to declare whether a changed condition existed, visited the site of the work only infrequently and relied instead upon information from his representatives at the site.[6] These representatives included an engineering firm engaged by the Government to supervise the work. This firm, the Court of Claims concluded, repeatedly supplied the Contracting Officer with incorrect information as to the extent of the sandstone that was being encountered.[7]

On March 1, 1948 respondent's claim for changed conditions was denied by the Contracting Officer,[8] and respondent

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[3] Petition, p. 31, Article 4.
[4] Petition, p. 3.
[5] Finding 42, Petition, p. 47; Finding 63, Petition, p. 58.
[6] Finding 62, Petition, p. 58.
[7] Par. 35 and 36, pp. 42-44 of the Petition; Par. 38, p. 45 of the Petition; Par. 47, top p. 49 of the Petition; Finding 60, foot p. 56 of the Petition to top p. 57 of Petition.
[8] Finding 104, foot p. 80 of the Petition.

noted an appeal under the disputes clause.[9] Respondent's appeal was heard by the Corps of Engineers Claims and Appeals Board as the authorized representative of the head of the department. In that proceeding no witnesses were subjected to oath, and respondent was not represented by counsel.[10] On March 14, 1949 the respondent's appeal was denied by the Board.[11]

One of the grounds relied upon for denial by the Board was a patently erroneous belief on its part that the changed conditions clause (Article 4 in respondent's contract) required written notice of changed conditions, which it did not, and that the respondent had "failed to give written notice of changed conditions as required by Article 4 of the contract."[12] This legal concept was subsequently admitted by Government counsel before the Court of Claims to be erroneous,[13] and was not contended for in the Government's briefs before that court.

Respondent instituted suit in the Court of Claims. More than 4000 pages of testimony were taken in that court. The case was not tried on the question whether the Court of Claims was restricted to the "administrative record", the testimony taken before the court by both parties covering all factual aspects of the matter. This is revealed by the extensive findings of fact which appear at pages 28-71 of the petition. The transcript of the "testimony" before the Board was received in evidence by the Court of Claims as Commissioner's Exhibit 1.

In its brief, filed after the passage of the Wunderlich Act, petitioner raised the question whether the Court of Claims was restricted to the "administrative record."[14] The

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[9] Finding 105, Petition, p. 81.
[10] Commissioner's Exhibit 1 in the Court below.
[11] Finding 105, pp. 81-86 of the Petition.
[12] Petition, p. 86.
[13] P. 135 of transcript of testimony before Court of Claims.
[14] Petitioner's brief before the Court of Claims, p. 21, *et seq.*

Court of Claims held that changed conditions had been encountered and that:

> The administrative findings of fact and decisions are *contrary to the overwhelming weight of the evidence in this case,* which clearly establishes that plaintiff encountered subsurface conditions at Pier 1-N, materially and substantially different from those shown on the contract drawings, and the administrative decisions are not supported by substantial evidence. [Italics supplied] [15]

While contending in the court below that the evidence introduced in open court had demonstrated that the denial of its claim had not been supported by substantial evidence, respondent also argued as an alternative issue that such denial was not supported by substantial evidence on the basis of the "administrative record." [16] This point was apparently lost sight of in the larger question presented, and was not decided.

Question Presented

Should the Wunderlich Act be interpreted to require the Court of Claims to restrict its inquiry into the finality of decisions arising under the standard form of Government contract disputes clause to the "administrative record" upon which such decisions might have been based, where the announced purpose of Congress in passing that Act was to overcome the decision of this Court in *United States* v. *Wunderlich*, 342 U. C. 98, where the Act re-established the rule that such administrative decisions possessed no finality if fraudulent, arbitrary, capricious, so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, all of which standards the Courts of Claims

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[15] Finding 107, pp. 86-87 of Petition.

[16] Respondent's Reply Brief before the Court of Claims, pp. 82-84.

had uniformly applied for many years on the basis of testimony received in open court, and where the Department of Justice, appearing before Congress, had expressed disfavor with the manner in which such standards had been applied by the Court of Claims?

Reasons for Denying the Writ

The Wunderlich Act Was Not Intended to Restrict the Court of Claims to a Review of a So-Called "Administrative Record", or to Change the Procedures that Had Been Followed by that Court in Contract Cases Involving Finality Clauses

The Court of Claims' jurisdiction over contract claims rests upon the Tucker Act, which authorizes that court to render judgment "upon any claim against the United States * * * founded upon any express or implied contract with the United States."[17] Suits involving contracts under the Tucker Act are original proceedings which seek money judgments for damages for breach of contract. Traditionally, parties before that court have been accorded a full opportunity to produce in open court all oral or written evidence legally competent and relevant to their cases.[18]

After the inclusion by the Government into its contract form of a disputes clause which sought to impress finality upon the administrative decisions of its employees, the Court of Claims was frequently called upon to examine such administrative decisions for the purpose of determining whether they had been properly rendered.

In considering the finality of administrative decisions under Government contracts, the standards of "such gross mistake as would necessarily imply bad faith" and of

[17] 28 U. S. C. § 1491 (4).

[18] Concurring opinion in *Volentine and Littleton* decision, App. *infra*, top p. 38.

"failure to exercise an honest judgment" were first announced by this Court in 1878,[19] and from that time until 1906 were applied by the Court of Claims without substantial elaboration.[20] By 1906 the scope of judicial inquiry was broadened to include the determination whether such decisions were arbitrary or capricious.[21] The aforementioned tests have been repeatedly applied to the present time,[22] along with the additional requirement that such adminis-

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[19] *Kihlberg* v. *United States*, 97 U. S. 398, 402 (1878).

[20] *Kennedy* v. *United States*, 24 C. Cls. 122, 139-146 (1889); *Byron Barlow* v. *United States*, 35 C. Cls. 514, 545-546, 551 (1900); *McLaughlin & Co.* v. *United States*, 37 C. Cls. 150, 188-189, 191-192 (1902).

[21] *Lewman, et al.* v. *United States*, 41 C. Cls. 470, 478 (1906).

Ripley v. *United States*, 223 U. S. 695, 701-702 (1912), to the effect that the administrative "judgment should be exercised—not capriciously or fraudulently, but reasonably and with due regard to the rights of both the contracting parties."

Saalfield v. *United States*, 246 U. S. 610, 613 (1918), "not arbitrarily, but candidly and reasonably."

[22] *Bray* v. *United States*, 46 C. Cls. 132, 138 (1911); *Axman* v. *United States*, 47 C. Cls. 537, 549 (1912); *Gearing* v. *United States*, 48 C. Cls. 12, 22 (1912); *Christie* v. *United States*, 48 C. Cls. 293, 325 (1913); *Toomey* v. *United States*, 49 C. Cls. 172, 186 (1914); *Pacific Hardware and Steel Co.* v. *United States*, 49 C. Cls. 327, 337 (1914); *Fitzgibbon* v. *United States*, 52 C. Cls. 164, 169 (1917); *Carstens Packing Co.* v. *United States*, 52 C. Cls. 430, 435 (1917); *William Miller* v. *United States*, 53 C. Cls. 1, 9 (1917); *Brinck* v. *United States*, 53 C. Cls. 170, 176-177 (1918); *Patrick Corr & Sons* v. *United States*, 55 C. Cls. 7, 23 (1919); *Pelton Water Wheel Co.* v. *United States*, 55 C. Cls. 31, 37 (1919); *Henry W. Volk, Trustee* v. *United States*, 55 C. Cls. 87, 100 (1920); *W. H. Taylor* v. *United States*, 55 C. Cls. 346, 348 (1920); *Page & Brinton* v. *United States*, 56 C. Cls. 176, 189 (1921); *Yale & Towne Mfg. Co.* v. *United States*, 58 C. Cls. 633, 637 (1923); *Sun Shipbuilding Co.* v. *United States*, 59 C. Cls. 757, 767 (1924), aff'd. 271 U. S. 96; *National Contract Co.* v. *United States*, 59 C. Cls. 441, 447 (1924); *Empire Engineering Co.* v. *United States*, 59 C. Cls. 904, 906 (1924); *Penn Bridge Co.* v. *United States*, 59 C. Cls. 892, 897 (1924); *Pauling & Co.* v. *United States*, 60 C. Cls. 699, 712 (1925), aff'd 273 U. S. 605; *Moran Bros. Co.* v. *United States*, 61 C. Cls. 73, 99 (1925); *Lustbader Const. Co.* v. *United States*, 62 C. Cls. 549, 561 (1926); *Levering & Garrigues Co.* v. *United States*, 71 C. Cls. 739, 757 (1931); *Mittry, et al.* v. *United States*, 73 C. Cls. 341, 362 (1931); *Southern Shipyard Corp.* v. *United States*, 76 C. Cls. 468, 480 (1932); *Albina Marine Iron Works* v. *United States*, 79 C. Cls. 714, 720 (1934); *McShain* v. *United States*, 83 C. Cls. 405, 409 (1936); *Amburgen*

trative decisions would not be upheld if substantial evidence could not be found for their support.[23]

The above history is summarized by the following quotation from the opinion of the Court of Claims in *Volentine and Littleton* (App., *infra*, p. 34):

> Long before the enactment of this statute [Wunderlich Act] this court and the Supreme Court of the United States has made decisions placing important limitations upon the finality provisions written into Government contracts. Cases in which the court concluded that the departmental decision was arbitrary, capricious, so grossly erroneous as to imply bad faith, or was not supported by substantial evidence, were held to be, by logical implication not intended to be covered by the finality provision.[24]

In deciding whether the administrative decision under a disputes clause was arbitrary, capricious, grossly erroneous, or not supported by substantial evidence, the Court of

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Dam Co. v. *United States*, 86 C. Cls. 478, 516, 523 (1938); *H. B. Nelson Construction Co.* v. *United States*, 87 C. Cls. 375, 389 (1938); *Baruch Corp.* v. *United States*, 92 C. Cls. 571, 585 (1941); *Hirsch* v. *United States*, 94 C. Cls. 602, 631 (1941); *Langevin* v. *United States*, 100 C. Cls. 15, 39 (1943); *De Armas* v. *United States*, 108 C. Cls. 436, 469 (1947); *Meltzer* v. *United States*, 111 C. Cls. 389, 486 (1948); *Newhall-Herkner* v. *United States*, 116 C. Cls. 419, 447 (1950); *Great Lakes Co.* v. *United States*, 116 C. Cls. 679, 684 (1950), 119 C. Cls. 504 (1951), *cert. den.* 342 U. S. 953; *Penner Installation Co.* v. *United States*, 116 C. Cls. 550, 563, 567, *aff'd* 340 U.S. 898 (1950).

[23] *Ruff* v. *United States*, 96 C. Cls. 148, 165 (1942); *Bein* v. *United States*, 101 C. Cls. 144, 166-167, 168 (1943); *Myers Co.* v. *United States*, 101 C. Cls. 41, 53 (1944); *Loftis* v. *United States*, 110 C. Cls. 551, 630 (1948); *Asheville Contracting Co.* v. *United States*, 110 C. Cls. 459, 500 (1948); *Mitchell Canneries, Inc.* v. *United States*, 111 C. Cls. 228, 247, 249 (1948); *Wunderlich* v. *United States*, 117 C. Cls. 92, 218 (1950), *rev.* 342 U. S. 98, 101; *Russell H. Williams* v. *United States*, 130 C. Cls. 435, 440 (1955), *cert. den.* 349 U. S. 938; *General Casualty Company* v. *United States*, 130 C. Cls. 520, 534 (1955), *cert. den.* 349 U. S. 938.

[24] See also concurring opinion on this topic (App., *infra*, foot p. 42.

Claims consistently followed its established practice of permitting both sides to offer whatever legally competent and relevant evidence they desired to submit, and the inquiry was not limited to a so-called "administrative record." Similarly, in no case that came before this Court from the Court of Claims was error declared to exist for failure to restrict the inquiry to an administrative record.

In the *Wunderlich* case (342 U. S. 98, 100), this Court did not suggest that the Court of Claims had erred in basing its findings of fact upon evidence which was clearly outside of the administrative record. Instead, this Court declared that the Court of Claims had applied too liberal a standard in reversing the administrative decision, and ruled that only by the establishment of fraud could such action be taken.

After the *Wunderlich* decision, Congress enacted the Wunderlich Act which provided that a decision made under a disputes clause should not be final if it is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence" (Petition, pp. 2-3).

The Wunderlich Act makes no pretence of being a jurisdictional statute, and is not even codified as such.[25] The

[25] This statute is not codified under Title 28 of the United States Code relating to the Judiciary and Judicial Procedure, where the Tucker Act appears, but instead is found in Title 41, U. S. C., Supp. IV, §§ 321 and 322, which title relates to Public Contracts. As the concurring opinion in the *Volentine and Littleton* case observes, other bills offered to obtain relief from the *Wunderlich* decision would have constituted amendments to the Judicial Code, all of which were rejected, *i. e.*, S. 2432, 82d Cong., 2d Sess.; H. R. 6214, 82d Cong., 2d Sess.; H. R. 6301, 82d Cong., 2d Sess.; H. R. 6338, 82d Cong., 2d Sess.; and H. R. 3634, 83d Cong., 1st Sess. (App., *infra*, p. 42).

Instead, the purpose of the Act was first to direct Government contracting agencies not to endeavor to seek absolute finality of their decisions on disputed questions of fact, and second, to expressly prohibit the inclusion of provisions in the contract seeking to establish finality of their decisions on disputes regarding questions of law. (App., *infra*, p. 42).

language of the Act itself indicates no intention on the part of Congress to alter in any respect the *original* jurisdiction which the Court of Claims possesses over contract claims under the Tucker Act, or to change that jurisdiction to an appellate one in the sense of restricting that court's inquiry to the review of a so-called "administrative record" upon which an administrative decision may have been based.

The inadequacy of the language employed in the Wunderlich Act to accomplish such a purpose is dealt with in the concurring opinion in the *Volentine and Littleton* decision, App., *infra*, pp. 37-39. If the word "review" is pointed to in this connection, it may be noted that the title of Sec. 1218 of the Renegotiation Act of 1951 (50 U.S.C. § 1218) reads "Review by The Tax Court", although the body of the section provides that a proceeding before the Tax Court "shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding *de novo*." Similarly, Chapter 13 of the Act of July 19, 1952, 66 Stat. 792, 802 (which Act revised the laws pertaining to the Patent Office), is entitled "Review of Patent Office Decision", yet provides for one type of review by way of an appeal to the Court of Customs and Patent Appeals, such review to be based "on the evidence produced before the Patent Office" (§ 141), and another by the commencement of a civil action against the Commissioner of Patents in the District Court of the District of Columbia, that court being granted the power to determine whether the applicant was entitled to the patent "as the facts in the case may appear" (§ 145). Thus, the word "review" under some circumstances may encompass a review of an administrative record, while in others it may also contemplate a proceeding *de novo*, or a combination of the two. Its meaning must be sought in the language of the statute where it is employed.

Similarly, nothing in the *legislative history* of the Wunderlich Act indicates a desire on the part of Congress either to change the jurisdiction of the Court of Claims over contract cases, or, what is more pertinent, to change in any way the long standing method that had been adopted by the Court of Claims for the adjudication of such cases involving administrative decisions on the basis of evidence received in open court bearing upon the standards that have been applied.

Congress expressed the purpose of the Wunderlich Act as being "to overcome the effect of the Supreme Court decision in the case of *United States* v. *Wunderlich* (342 U. S. 98)",[26] but it is most important for the purpose of this case to observe that in doing so Congress was attempting to *restore* the situation to what it had been prior to the *Wunderlich* decision. Witnesses who appeared before the Congressional Committees testified that the effect of the proposed statute would be to restore the law to substantially what it had been prior to the *Wunderlich* decision.[27] That Congress understood it was in fact restoring the standards of arbitrariness and capriciousness when applied to administrative decisions, and was also adopting the standard of substantial evidence, is evident from H. R. Rep. 1380, 83d Cong., 2d Sess., p. 4, where it said:

> A principal change which the amendment effects in S. 24 is to restore the standards of review based on arbitrariness and capriciousness. These have long

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[26] H. R. Rep. 1380, 83d Cong., 2d Sess., p. 1.

[27] Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 82d Cong., 2d Sess., 1952, on Finality Clauses in Government Contracts, top p. 66; pp. 57-58.

Hearings Before Subcommittee No. 1, Committee on the Judiciary, House of Representatives, 83rd Cong., 1st and 2d Sess., 1953-1954, on Review of Finality Clauses in Government Contracts, top p. 98.

been recognized as constituting a sufficient basis for judicial review of administrative decisions, a reference to capricious action on the part of a Government contracting official vested with discretionary power of decision being found as early as 1911 in the decision of the Supreme Court in *Ripley* v. *United States* (223 U. S. 695). • • •

The proposed amendment also adopts the additional standard that the administrative decision must be supported by substantial evidence. • • •

At no time before or after the consideration by Congress of the Wunderlich Act has a statute been enacted authorizing the use of a disputes clause in Government contracts, or prescribing the procedure to be followed in its application, or defining the administrative record to be assembled, these matters being left to the discretion of the department head.

At the time the Wunderlich Act was being considered, Congress was advised that the disputes clause was not of statutory origin, and that its inclusion in the Government form of contract was not a matter of negotiation.[28] Con-

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[28] E. L. Fischer, General Counsel, General Accounting Office, and R. F. Keller, Assistant to the Comptroller General, in the Hearings Before Subcommittee No. 1, Committee on the Judiciary, House of Representatives, 83rd Cong., 1st and 2d Sess., 1953-1954, on Review of Finality Clauses in Government Contracts, at p. 39 testified as follows:

Mr. Walter. I would like to get around to that standard form. Where does the authority come from for article 15, the article with respect to disputes?

Mr. Fischer. There is no statutory authority for the article. It has just grown up from practice.

Mr. Walter. Just one of those bureaucratic Topsys.

Mr. Keller. Mr. Walter, it might be what you would call the inherent right of a contracting party to enter into certain terms. I will agree with you——

Mr. Walter. Now wait a minute. Inherent right of a party to enter into certain terms. The contractor has no voice in what that article contains, has he?

gress also knew that proceedings under such clauses lacked uniformity among the various agencies, and in some instances constituted a travesty upon administrative due process. It was informed, for example, that while some agencies operated efficiently,[29] others had no procedures for the handling of appeals.[30] It was also advised that instances existed where an agency would permit its board to hear the contractor's witnesses, after which the Government would produce no witnesses of its own, and the Board would then accept *ex parte* statements from the Government representatives whose decision had been the subject of the appeal, thereby depriving the contractor of the opportunity of cross-examination.[31]

The correctness of these views is fully supported by the experience of the Court of Claims, which it has summarized in its opinion in *Volentine and Littleton* v. *United States*. The Court of Claims there emphasized that "administrative records" in cases involving contract dispute clauses are "in many cases a mythical entity" without transcript of record; that there exists "no power to put witnesses under

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Mr. Keller. Well, he has a voice, but sometimes it cannot be heard very loudly. I have heard many of them protest.

Mr. Walter. Will you give us a case where it has ever been heard?

Mr. Graham. You mean above a murmur.

Mr. Walter. A whisper.

Mr. Keller. Offhand, I can't, but there are variations made from time to time in special cases.

[29] Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 82d Cong., 2d Sess., on Finality Clauses in Government Contracts, 1952, p. 95.

[30] Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 82d Cong., 2d Sess., 1952, on Finality Clauses in Government Contracts, pp. 103-104; Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st and 2d Sess., 1953-1954, on Review of Finality Clauses in Government Contracts, pp. 15-16.

[31] Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st and 2d Sess., 1953-1954, on Review of Finality Clauses of Government Contracts, top p. 16, pp. 78-79.

oath or to compel the attendance of witnesses or the production of documents"; and that such Boards frequently upon their own initiative make independent inquiries without a contractor being present (App., *infra*, p. 35). The Court of Claims further stated that to gather together the pieces of a so-called "administrative record" would be a considerable task which, in many cases, would require the unthinkable procedure of putting the deciding officer on the stand to "ask him what he knew when he made his decision" (App., *infra*, pp. 35-36).

Congress also knew at the time that it was considering the Wunderlich legislation that the Court of Claims was not exercising an appellate type review of an administrative record. One of the principal objectors to the inclusion in the Wunderlich Act of the standards "arbitrary" and "capricious" was the spokesman for the Department of Justice, who expressed the view to the Committee that the use of such words would be an "open invitation" for the Court of Claims to continue to substitute its judgment for the head of the department, his testimony reading:

> We would, however, be vigorously opposed to the employment in such a declaration of such words as "arbitrary" or "capricious."
>
> Aside from the indefinite nature of the standard which would be so established, *we know from long experience that the Court of Claims would construe these terms to mean that it could substitute its judgment for that of the head of the department in any case it felt so inclined.*
>
> If you use words like "arbitrary" and "capricious," which are completely devoid of substantive meaning and are indefinite in nature, *it will constitute an open invitation to the Court of Claims to do what it has done*, despite the fact that the rule of law was other-

wise; that is, to substitute its judgment for that of the head of the department concerned in any case it felt so inclined. [Italics supplied] [32]

In view of the long line of cases in which the Court of Claims had applied the standards of arbitrariness, capriciousness, gross error and lack of substantial evidence arrived at on the basis of testimony taken in open court,[33] it is obvious that what the spokesman from the Department of Justice was objecting to was the refusal of the Court of Claims to be bound by what had transpired in the so-called administrative proceeding.

From the foregoing, it is clear that Congress was fully aware not only of the inadequacy of procedures being followed under the disputes clauses by various agencies, but also the manner in which cases involving such clauses were being adjudicated by the Court of Claims.

Where Congress in the past has desired to vest in a court a strictly appellate type jurisdiction over administrative decisions, it has found it possible to do so with precision and without the need to indulge in inferences from the language it has employed. The dissimilarity of the Wunderlich Act to other statutes where an appellate type review of administrative action was clearly intended has been noted in the concurring opinion in *Volentine and Littleton*, App., *infra*, pp. 39-42.

For example, in the Administrative Procedure Act, 5 U. S. C. Chp. 19, procedures were prescribed which the agencies were to follow in arriving at a decision [§ 1006]. The right to subpoena witnesses and documents was granted [§ 1005(c)], and provision was made for testimony under

[32] Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, on Finality Clauses in Government Contracts, 1952, top p. 19.

[33] See footnotes 22 and 23, pp. 7 to 8 of this brief.

oath [§ 1006(b)]. It was also provided that the usual rules of evidence were to be followed [§ 1006(c)]. A formal administrative record was required to be prepared, containing both the oral testimony and such documents as were introduced in evidence [§ 1006(d)]. Section 1009 of that Act authorized the courts to set aside findings of fact where such findings were arbitrary, capricious, in abuse of discretion, or unsupported by substantial evidence "reviewed on the record of an agency hearing provided by statute" [§ 1009(e)].

The legislative history behind the Wunderlich Act reveals an unwillingness on the part of Congress to so restrict the jurisdiction of the Court of Claims in contract cases because in the 82d Congress, 2d Session, there was introduced H. R. 6404, that would have amended the Administrative Procedure Act to permit judicial review on appeal of decisions of department heads in disputes arising under Government contract, which bill Congress saw fit to reject.[34]

[34] H. R. 6404, 82d Cong., 2d Sess., provided:

A BILL

To amend Public Law 404, Seventy-ninth Congress, approved June 11, 1946 (60 Stat. 237).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Public Law 404, Seventy-ninth Congress, approved June 11, 1946 (60 Stat. 237), is hereby amended to read as follows:

"JUDICIAL REVIEW

"SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) RIGHT OF REVIEW.—

"(1) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(2) Notwithstanding the provisions of section 2(a), (4) hereof and the two exceptions in the first paragraph of section 10 hereof, any person who shall hereafter suffer or be threatened with actual

Another example of the definition with which Congress acts in conferring appellate jurisdiction is found in the Act of December 29, 1950, 64 Stat. 1129; 5 U. S. C. §§ 1031-1042 inclusive. There Congress gave the Court of Appeals the right to determine the validity of orders of the Federal Communications Commission, the United States Maritime Commission, and other agencies [§ 1032]. The Act stipulated that such appeal "shall be heard • • • upon the record of the pleadings, evidence adduced, and proceedings before the agency where the agency in fact had held a hearing • • •." [§ 1037(a)]. Section 1037, subsection (c) gave a party the right to seek leave of the appellate court to produce additional evidence if material, and if reasonable grounds existed for failure to adduce such evidence before the agency.

If Congress desired to provide a similar type of appellate court review under the Wunderlich Act from decisions of the head of the department, it is clear from the above that it knew how to do so. Instead of using language such as that referred to above, Congress did not provide for an appellate type review of an administrative record, nor did it require the correction of any of the known deficiencies in the procedures followed in the administrative determination of disputes under the disputes clause of Government contracts. As stated in the concurring opinion in *Volentine and Littleton:*

> • • • Congress was aware of the fact that some contracting agency heads delegate their contract obligation to reach a decision on a dispute arising under the

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injury or loss as the result of agency action in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, or as the result of arbitrary and capricious agency action, amounting to an abuse of discretion, whether or not such injury or loss has heretofore conferred upon such person standing to sue, shall be entitled to judicial review thereof."

contract to a board of employees, and that such a board then attempts to reduce that knowledge to some sort of written record. Congress also knew that other contracting agency heads render their decisions without the aid of any such "record." Congress knew how to legislatively require the making of a record, affording the parties to the dispute administrative due process, and also it knew how to make the decision based on such a record reviewable on appeal. A reading of the Administrative Procedures Act and the Indian Claims Commission Act which do precisely that, indicates that it requires considerably more legislation than was indulged in in the Wunderlich Act (App. *infra*. p. 41).

With full comprehension of the irregularity, and in many instances the inadequacy of the administrative proceedings which took place in advance of the administrative decision, with full knowledge of the manner in which these administrative decisions had been tested by the Court of Claims over a period of many years on the basis of evidence received in open court, and with the pronounced purpose of overcoming the *Wunderlich* decision, of restoring the law to what it had been, and of definitely precluding the inclusion in future Government contracts of clauses giving the Government the right to finally determine the law of the contract, the Wunderlich Act would seem to be a strange vehicle for Congress to have employed to bring about basic changes in the manner in which the Court of Claims over a period of many years had adjudicated cases involving the finality of decisions rendered under the disputes clause in a Government contract.

The impracticability of attempting to convert the Wunderlich Act into a statute which would restrict the Court of Claims to the review of an administrative record is further evident from the fact that such statute nowhere authorizes

the so-called administrative record to become a part of the court proceeding in a contract case. Such administrative records in most instances contain the unsworn testimony of witnesses who were heard by the Board, and such testimony would constitute hearsay evidence that would be inadmissable over the objection of either party. In the absence of a statutory requirement that such transcripts be considered by the court, as has been provided in other statutes where an appellate type review of an administrative record was intended, the possibility of the Court of Claims restricting its review to the administrative record would have to depend upon whether or not objection was interposed to the introduction of such hearsay evidence.[35]

Payment by Congress of Wunderlich Judgment Showed Clear Intent that Court of Claims Should Not Be Restricted To Review of Administrative Record

Another clear insight to the intent of Congress can be gained from the action which it took with respect to the claim of Martin Wunderlich Company that had been disallowed by this Court (117 C. Cls. 92, rev. 342 U. S. 98).

On September 4, 1957 there was approved Private Law 85-306, 85th Congress, H. R. 2654 "For the relief of Martin Wunderlich Company", in which Congress appropriated $111,539.59 to be paid to that company, representing the unpaid balance of the judgment on the claim in question (Claim No. 17), as granted by the Court of Claims. In the *Wunderlich* case, on the basis of testimony taken in open court, the Court of Claims had concluded that there was no substantial evidence to support the administrative decision, and that the same was arbitrary and capricious (*Martin Wunderlich, et al.* v. *United States*, 117 C. Cls. 92, 218-219).

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[35] Concurring opinion in *Volentine and Littleton* decision, App., *infra*, p. 43.

The legislative history behind Private Law 85-306 for the relief of Martin Wunderlich Company includes Senate Report No. 1153 of the Committee on the Judiciary, 85th Cong., 1st Sess., dated August 28, 1957, which at page 2 reads as follows:

> Shortly after the Supreme Court rendered its decision in 1951, several bills were introduced in both Houses of Congress to overcome the effect of the decision and cure the manifestly unjust situation. One bill, S. 2487, passed the Senate during the 82d Congress, but reached the House too late of [sic] action during that session. During the 83d Congress S. 24 was passed by both Houses and became Public Law 356. This law *restored the earlier standards of judicial review*, and permits the Court of Claims to set aside administrative decisions on the ground of fraud, including arbitrary or capricious action, and requires that administrative decisions must also be supported by substantial evidence. [Italics supplied]

In paying a judgment upon which evidence received by the Court of Claims in open court had been used to set aside an administrative decision, Congress again manifested its intention that the inquiry of the Court of Claims into the finality of the administrative decision should not be restricted to a so-called "administrative record."

Petitioner Would Impose an Impracticable Procedure On Contract Litigation Which Would Confuse and Delay the Disposition of Contract Cases in the Court of Claims

In its opinion in the *Volentine and Littleton* case, the Court of Claims has pointed out that the position urged by petitioner would require two trials where one presently suffices. The first trial would call for the presentation of

the case on the basis of the "administrative record", and would involve a study of that record to determine whether, on the basis of what was in that record, the administrative decision was tolerable (App. *infra*, p. 35). In those instances where the administrative record did not stand, there would be a second trial on the merits, with all relevant evidence admissible, whether it was in the "administrative record" or not (App. *infra*, p. 36). This would be necessary because no statutory authority exists for the remand by the Court of Claims to any one of the appeals boards for further proceedings.

It was developed in the hearings which preceded the enactment of the Wunderlich Act that Corps of Engineers construction contracts which involve the expenditure of *military construction funds*, are so phrased as to require the contractor first to take an appeal from the contracting officer to the Engineers' Claims and Appeals Board, following which, in the event of an unsatisfactory decision, an appeal must be taken to the Armed Services Board of Contract Appeals, which Board would proceed with a *de novo* consideration of the matter.[36] Therefore, under the procedure urged by the petitioner in the circumstances referred to above, there would first be a consideration of the appeal by the Corps of Engineers Claims and Appeals Board; a second and *de novo* consideration by the Armed Services Board of Contract Appeals; a first trial by the Court of Claims, restricted to analysis of the administrative record, and a second trial in the Court of Claims based on the merits. Such procedure would be confusing and so time consuming as to make any hope of recovery on a contested contract claim a distant one from the standpoint of time.

[36] Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 82d Cong., 2d Sess., 1952, on Finality Clauses in Government Contracts, p. 101.

In Footnote 4, p. 8 of the petition, petitioner attempts to avoid this conclusion by stating that instead of two trials, the Commissioner could take all the evidence offered "but the Court should not consider evidence outside the administrative record if that record provides 'substantial' support for the departmental decision." Using, as an example, the present case in which more than 4000 pages of testimony were taken on the merits, the impracticability of petitioner's suggestion is immediately evident, for it would require the expenditure of a vast sum of money and effort on the part of a litigant to prove the merits of his case before he would be in position even to ask the Court of Claims to conduct its first trial based on the review of the "administrative record."

The confusion and delay which petitioner's suggested procedure might have upon the disposition of cases in the Court of Claims was noted by that court in its decision in the *Volentine and Littleton* case, where it observed:

> What the Government asks us to do would run counter to the traditional handling of this problem. As we have said, the law as we applied it before the Supreme Court's decision in the *Wunderlich* case was substantially the same as what is in the 1954 statute. It was judge-made law instead of legislature-made law. There would have been the same logical reason for dividing such lawsuits into two stages then as now. But it was never done, nor, we think, urged upon the Court. We think that those who agitated for the 1954 act, and the Congress which passed it, intended that, under the statute, we should go on as we had been doing before the Supreme Court's decision. If this is a correct assumption, we should not, in order to tidy up the logic of our procedure, introduce new steps *which might well have the effect of confusing the issues and*

delaying their decision. [Italics supplied] (App. *infra*, p. 36).

The Fears Expressed by the Assistant Judge Advocate General of the Army Concerning The Effect of The Decision Below Are Unfounded

At p. 13 of the petition, there is set forth the contents of a letter received by the Attorney General from the Assistant Judge Advocate General of the Army, dated June 28, 1957, in which he expresses the view that the decision below would have "far-reaching implications upon governmental procurement", would subject every decision of the Armed Services Board of Contract Appeals "to a trial *de novo* in the Court of Claims on the merits", and would permit the contractor to appeal every adverse decision "merely by alleging there was not substantial evidence", which would result in "a far greater case burden upon the court." It is worth noting that this letter was not written until more than eight months after the decision of the Court of Claims in the *Volentine and Littleton* case.

The fear expressed that the decision below would permit a *de novo* trial in the Court of Claims on the merits is unrealistic and completely ignores the fact that the Court of Claims has consistently over a period of many years set aside administrative decisions only after first determining that they were arbitrary, capricious, so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence.[37] There never has existed a trial *de novo* in the Court of Claims on such matters.

The statement in the letter that all a contractor would have to do to avoid such a decision would be to allege "there was not substantial evidence" ignores the following re-

[37] See citations under footnotes 22 and 23, pp. 7 to 8 of this brief.

quirements of pleading imposed by the Court of Claims in *Volentine and Littleton:*

> In cases raising the questions discussed herein, the plaintiff must, in his petition, do more than repeat the derogatory language of the statute. He must allege facts which, if proved, will show that the departmental decision was intolerable, and hence was deprived of finality by the statute. Then there may be cases in which the plaintiff's own proof, before the introduction of any evidence by the Government, will show that the departmental decision, though we might disagree with it, was adequately founded. In such cases the modern substitute for a demurrer to the evidence would stop the case at that stage. In any event, we think that the procedure which worked reasonably well before the statute was enacted, should not now be discarded. (App. *infra*, p. 36)

It is also pertinent on this point to note that the petitioner does not contend that the Court of Claims would be restricted to the "administrative record" in cases where the plaintiff in the Court of Claims alleged that the administrative decision was faulty under any of the other standards of the Wunderlich law, except the substantial evidence test. If the Assistant Judge Advocate General's position is accepted, there would still be nothing to prevent a trial *de novo* in the Court of Claims where the administrative decision was attacked as being arbitrary or capricious rather than not being based on substantial evidence. Certainly the difference between these standards is not great enough, if any difference there is, to justify completely different procedures before the Court of Claims.

During the hearings on the Wunderlich Act, the Deputy General Counsel of the Department of Defense appeared in

opposition to the enactment of legislation on this subject because his Department, following the Wunderlich decision, had "immediately modified its disputes clauses * * * to limit finality by providing that the decision of the head of the department would be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith."[38] At the time of the inclusion of this clause in Department of Defense contracts, that Department certainly knew that decisions rendered under it would be reviewed by the Court of Claims on the basis of the court's own record. Yet that Department's witness expressed no fear of such a result.

The question whether the enactment of the legislation would increase the burden of the courts was discussed by the Deputy General Counsel of the Department of Defense, as follows:

> *Mr. Walter.* People do not take appeals just because they can. If a contractor is not treated fairly, in his own mind, why should he not have the opportunity to present his cause as he sees fit and have some independent agency pass on the question of whether or not he is right or wrong? He is not going to take an appeal only because he can.
>
> *Mr. Niederlehner.* Are we talking about the numbers, sir?
>
> *Mr. Walter.* Yes.
>
> *Mr. Niederlehner.* I think that in any case at the present time where he has been treated fairly, he would not have to appeal. Where he has not been treated fairly, at least according to the criteria which we have

[38] Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on Review of Finality Clauses in Government Contracts (1953-1954), top p. 53.

listed, he would have the right of appeal under separate statute. So again it becomes a question of whether or not there should be no administrative finality whatsoever and that all disputes should be left to the courts, *or whether we can relieve the burden of the courts,* provide an expeditious method of settlement, and provide for an appeal to the courts in certain situations. We have listed some in the regulations and these bills list them.

Mr. Walter. I have heard that argument for many years, you know. At one time or other I was interested in a bill that subsequently became the law, providing for a judicial review of decisions of administrative agencies. Your argument is typical—namely, that if the right to review is given, the courts will be clogged. It just has not happened that way.

Mr. Niederlehner. If I could suggest, sir, I think you are referring to the Administrative Procedure Act, and I don't think that an unlimited right of review is granted by that.

Mr. Walter. No; and none of this legislation grants an unlimited right of review. [Italics supplied][39]

On the day following the appearance of the Deputy General Counsel of the Department of Defense, there appeared before the subcommittee the Assistant General Counsel of the Navy Department who testified as follows:

As Mr. Niederlehner stated yesterday, our basic position is that we do not feel that legislation is necessary because, so far as the Department of Defense is concerned, we have changed the form of our disputes

[39] Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on Review of Finality Clauses in Government Contracts (1953-1954), pp. 55-56.

clause and we feel that that has eliminated most of the problem.

However, if this committee should feel in its judgment that legislation is necessary or desirable, the Department of Defense feels that legislation in the form proposed by the Comptroller General in his letter to the chairman of December 30, which would be a form of an amendment to S. 24, the revision of S. 24, would be workable and we would not object to it.

We are impressed by the fact that, this morning, representatives of three of the very largest and most important trade associations, who themselves represent a very large and important segment of defense industry, contractors with whom we deal, have stated that they would not object, or would support legislation in that form. And, since, after all, they are the people with whom we are placing these contracts, we feel it is quite important that there be a meeting of the minds, as it were, and that we all be, so far as possible, satisfied with the position taken by each other with respect to contract clauses.[40]

The legislation proposed by the Comptroller General, to which the witness referred, was the basis of the Wunderlich law as finally enacted.

As the Court of Claims had for many years prior to the passage of the Wunderlich Act uniformly applied the rule of substantial evidence, as well as the other standards of review, on the basis of evidence received in open court, and not on the basis of an administrative record, the Assistant Judge Advocate General of the Army should not have been

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[40] Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on Review of Finality Clauses in Government Contracts (1953-1954), p. 123.

surprised by the rule followed by the court below, and the fears which he has expressed are without foundation.

In the past it has been suggested that such administrative proceedings afford an opportunity for superior officers to adjust more easily and satisfactorily the errors of their subordinates.[41] This view has never received practical application for the reason that the members of the appeal boards are predominately lawyers who are not qualified to give direction concerning technical aspects of the contract work, and the volume of cases which they are required to hear is such as to generally result in the initial hearing being conducted months, if not years, after the fact.

There Is No Conflict Between The Court of Claims And The Court of Appeals For The Third Circuit

In paragraph 3, p. 12 of the petition, the petitioner asserts that there is a conflict between the decision of the Court of Claims in this case and the decision of the Court of Appeals for the Third Circuit in *Langoma Lumber Corp.* v. *United States,* 232 F. 2d 886 (1956), which affirmed a decision of the District Court for the Eastern District of Pennsylvania, 140 F. Supp. 460. The existence of such conflict is denied.

The *Langoma* case involved a claim by a contractor whose contract had been terminated for default. The claim had been denied by the Armed Services Board of Contract Appeals, after a hearing, and as the claim involved less than $10,000, suit was instituted in the District Court. In deciding this case, the District Court, after trial, arguments and review of the briefs, found that the decision of the Armed Services Board was supported by substantial evidence in the record made before the Board (140 F. Supp. 460, 461, 462), but there is nothing in the District Court's

[41] *United States* v. *Blair,* 321 U. S. 730, 735.

decision which indicates that the trial before that court was restricted to the record made before the Armed Services Board, or that the issue presented in the present case was raised by either party.

A reading of the Third Circuit Court's decision clearly reveals that the Circuit Court, in affirming the District Court's denial of the claim, expressly avoided any decision interpreting the meaning of "substantial evidence" as used in the Wunderlich Act, or laying down the procedure to be followed in determining the existence of "substantial evidence." The Circuit Court of Appeals at 232 F. 2d 886, 887, stated:

> The plaintiff did, however, appeal to the Armed Services Board of Contract Appeals after the defendant had notified the seller of its desire to terminate the contract. This Board upheld the contracting officer in a detailed opinion. So, as already said, did the district court. We do not find any error in the *result* reached. *Nor do we find in the case any necessity of trying to enunciate precisely whether "substantial evidence" used as a canon in the review of administrative proceedings has the same meaning in all types of review.* We think the correctness of the result reached is established by the testimony of Mr. Mandel, president and chief officer of the plaintiff corporation. It shows that the corporation did not follow the terms of the contract. Both the administrative tribunal and the district court were correct in holding that there could be recovery by the defendant but not by the plaintiff. [Italics supplied]

Since the Court of Appeals abstained from passing on the point in issue in the present case, there is no basis for the petitioner's assertion that there is a conflict between the two courts.

This Court Has Denied Certiorari In Two Comparable Cases Since the Passage of the Wunderlich Act

Since the passage of the Wunderlich Act, this Court has denied the Government's application for writ of certiorari in two cases, in both of which the Court of Claims, acting on evidence produced in open court, had set aside an administrative decision rendered under a disputes clause as not based on substantial evidence.

Russell H. Williams, et al. v. *United States*, 130 C. Cls. 435, 440, decided on January 11, 1955, involved a disputes clause. The Court of Claims "considered the evidence on both sides in order to determine whether it appears that the evidence in support of the administrative decision can fairly be said to be substantial", and ruled that the decision was not supported by substantial evidence. In its reply brief filed on August 12, 1954 (3 months after the passage of the Wunderlich Act), the Government had argued that the test of substantial evidence must be "limited to the record which was before the administrative official."[42] The inquiry of the Court of Claims was not so limited but was based on all evidence received by the court.

In *General Casualty Company of America, et al.* v. *United States*, 130 C. Cls. 520, 534 (also decided on January 11, 1955), the question before the Court of Claims was whether a changed subsurface condition had been encountered, a situation similar to that involved in the present case. The Court of Claims ruled that failure on the part of the head of the department to recognize a changed condition was "arbitrary and was not supported by substantial evidence." It is clear that such conclusions had been based upon the proof received by the court, as dis-

[42] P. 183 of Government's Reply Brief in *Russell H. Williams* v. *United States*, 130 C. Cls. 435.

tinguished from the administrative record, because the format of the opinion and the court's findings of fact (pp. 557-563) showed no intention of restricting the inquiry to the review of an administrative record.

The Government joined both cases in a petition for writ of certiorari filed April 7, 1955, said petition stating in part:

> Nowhere in its opinions in these cases does the court below purport to give any weight to the specialized knowledge of the government officials designated by the contracts as the final arbiters of factual disputes. Nor does the court hold that the evidence in support of the determinations challenged by respondents was so inadequate that a reasonable mind would reject it or that, if the trial were to a jury, the court would have been justified in directing a verdict for respondents. On the contrary, the court found only that "the substantial weight of the evidence supports an amount in excess of that allowed by the head of the department" (App. *infra*, p. 7A). In pointing this out, we do not mean to suggest that the court's responsibility for the reasonableness and fairness of factual determinations made by government officials under the "finality clause" can be discharged only by following a prescribed form of expression. On the contrary, an examination of what the Court of Claims actually did, in contrast with the general words in its opinions, discloses that, in each of the instant cases, the court has substituted its own appraisal of the evidence for the choice made by the head of the department between "two fairly conflicting views." • • •

The application for writ of certiorari in each of the cases was denied on May 23, 1955 (349 U.S. 938).

Conclusion

It is respectfully submitted that for the reasons stated, the petition for a writ of certiorari should be denied.

JOHN W. GASKINS,
Attorney for Respondent.

KING & KING,
Of Counsel.

OCTOBER, 1957.

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 62-54

(Decided November 7, 1956)

VOLENTINE AND LITTLETON, CONTRACTORS, A PARTNERSHIP, COMPOSED OF M. O. VOLENTINE AND EARL LITTLETON

v.

THE UNITED STATES

Mr. Ras Priest for the plaintiff.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff partnership had a contract with the Government to clear the timber from the site of the reservoir which was to be created by the Whitney Dam on the Brazos River in Texas. It sues to recover alleged extra costs which it incurred because of the Government's actions, and liquidated damages assessed against it by the Government. The plaintiff says that while it was performing the contract, the Government closed the dam and thereby inundated the lower part of the plaintiff's work.

The plaintiff's contract contained a provision, lodging in the Government's contracting officer the power to decide disputes arising under the contract concerning questions of fact, giving to the contractor the right to appeal from such decisions to the head of the department, and providing that decisions so arrived at should be final. The contracting officer, upon claims made by the plaintiff, made awards which the plaintiff regarded as inadequate. It appealed to the head of the department who gave it no further relief. It now sues in this court, alleging that the departmental deci-

sion was not final because it was arbitrary, capricious, fraudulent and not based on substantial evidence.

The plaintiff's allegations are obviously intended to place its case within the coverage of the act of May 11, 1954, 68 Stat. 81, 41 U. S. C. (1952 Ed., Supp. II) § 321-322, which says:

> That no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> SEC. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

Long before the enactment of this statute, this court and the Supreme Court of the United States has made decisions placing important limitations upon the finality provisions written into Government contracts. Cases in which the court concluded that the departmental decision was arbitrary, capricious, so grossly erroneous as to imply bad faith, or was not suported by substantial evidence, were held to be, by logical implication, not intended to be covered by the finality provision. But the Supreme Court, in *United States* v. *Wunderlich*, 342 U. S. 98, held that the only situation not validly covered by the finality clause was that of actual intentional fraud perpetrated by the departmental officials.

At the instigation of contractors and their counsel, the statute quoted above was enacted. Its legislative history shows that, in general, its purpose was to restore the law to what it was generally thought to be before the Supreme Court's decision in the *Wunderlich* case.

In the instant case, the plaintiff introduced, before our commissioner, evidence intended by it to show that the Government had breached its contract, and that there was no substantial support for the departmental decision that it had not done so. The plaintiff then rested.

The Government declined to introduce any evidence in its defense, taking the position that the plaintiff had failed to produce the only piece of evidence which was material at that stage of the case, i. e., the record of the evidence which was before the contracting officer and the head of the department when they made their decisions adverse to the plaintiff. The Government says that one cannot apply the derogatory language which the statute uses to the departmental decision, unless one knows the evidence on which the decision was based, which might have been very different evidence from that presented in this court.

There is logic in the Government's position. But we do not adopt it. It would require two trials in many cases involving this question. The first trial would include the presentation of the "administrative record" and its study to determine whether, on the basis of what was in it, the administrative decision was tolerable. But the so-called "administrative record" is in many cases a mythical entity. There is no statutory provision for these administrative decisions or for any procedure in making them. The head of the department may make the decision on appeal personally or may entrust anyone else to make it for him. Whoever makes it has no power to put witnesses under oath or to compel the attendance of witnesses or the production of documents. There may or may not be a transcript of the oral testimony. The deciding officer may, and even in the departments maintaining the most formal procedures, does, search out and consult other documents which, it occurs to him, would be enlightening, and without regard to the presence or absence of the claimant.

If we were to attempt to make a decision on the basis of the "administrative record" it would be a considerable task, in many cases, to gather together the pieces of that so-called record and get them all under our eyes at once. A helpful step in doing that would be to put the deciding officer

on the stand and ask him what he knew when he made his decision. That step would, of course, be unthinkable.

The second trial referred to above would be the trial on the merits, with all relevant evidence admissible, whether it was in the "administrative record" or not. That trial would be necessary in every case where we decided, on the first trial, that the departmental decision was not final.

What the Government asks us to do would run counter to the traditional handling of this problem. As we have said, the law as we applied it before the Supreme Court's decision in the *Wunderlich* case was substantially the same as what is in the 1954 statute. It was judge-made law instead of legislature-made law. There would have been the same logical reason for dividing such lawsuits into two stages then as now. But it was never done, nor, we think, urged upon the court. We think that those who agitated for the 1954 act, and the Congress which passed it, intended that, under the statute, we should go on as we had been doing before the Supreme Court's decision. If this is a correct assumption, we should not, in order to tidy up the logic of our procedure, introduce new steps which might well have the effect of confusing the issues and delaying their decision.

In cases raising the questions discussed herein, the plaintiff must, in his petition, do more than repeat the derogatory language of the statute. He must allege facts which, if proved, will show that the departmental decision was intolerable, and hence was deprived of finality by the statute. Then there may be cases in which the plaintiff's own proof, before the introduction of any evidence by the Government, will show that the departmental decision, though we might disagree with it, was adequately founded. In such cases the modern substitute for a demurrer to the evidence would stop the case at that stage. In any event, we think that the procedure which worked reasonably well before the statute was enacted, should not now be discarded.

Although, as appears above, the Government declined to introduce any evidence at the hearing before our commissioner, we shall not foreclose it from now introducing evidence, if it wishes to do so. It was seeking to obtain a

decision on an important legal question and we will not penalize it for having done so. The case is remanded to the commissioner of this court, who will proceed with it in the regular course.

It is so ordered.

WHITAKER, *Judge*, and JONES, *Chief Judge*, concur.

LITTLETON, *Judge*, concurring:

I am in agreement with the conclusions reached by the majority of the court and with the reasons advanced in support of those conclusions. I should like, however, to suggest some additional grounds for concluding that the act of May 11, 1954, 68 Stat. 81, hereinafter referred to as the Wunderlich Act, does not limit the Court of Claims to a consideration of the evidence produced before the head of a contracting agency in deciding whether a decision rendered by such agency head under the standard contract disputes clause is not final because fraudulent, capricious, arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

The interpretation placed upon the Wunderlich Act by the Government suggests that the statute is a jurisdictional act which might be said to do one of the following things: (1) change the jurisdiction of the Court of Claims in a contract case involving a disputed question of fact from jurisdiction over an original proceeding to an appellate proceeding similar to that provided for in the Indian Claims Commission Act, 60 Stat. 1049, or the Administrative Procedures Act, 62 Stat. 237; (2) change the jurisdiction of the Court of Claims in a contract case to jurisdiction to entertain a petition to review; or (3) change the jurisdiction of this court in contract cases to jurisdiction to render an administrative and not a judicial decision.

I am of the opinion that neither the language of the Wunderlich Act nor its legislative history justifies the conclusion that the jurisdiction of this court in contract claims has been altered in any way. This jurisdiction in contract suits is found in 28 U. S. C. § 1491 (4) which provides that the Court of Claims shall have jurisdiction to render judgment "upon any claim against the United States * * * (4)

founded upon any express or implied contract with the United States * * *."

All suits brought under section 1491 are in the nature of original proceedings based on competent evidence adduced by both parties in open court. In claims against the United States founded upon contract it is the function of this court, as it is of any court in private contract litigation, to determine the rights and liabilities of the parties in the light of all the relevant facts and under the terms of the particular contract in suit as interpreted by the court. The problems involved in interpreting the provisions of a Government contract are no different from those involved in interpreting a private contract except that where Congress by legislation has placed some limitation on the particular Government agency's authority to contract, the contract of that agency must be interpreted in the light of any such statutory limitation.

In arguing that Congress in passing the Wunderlich Act intended to limit this court in determining the issue of the finality of the decision of a department head under a disputes provision to a consideration of the "record" on which that department head chose to base his decision, defendant relies heavily on the use of the word "review" and the expression "supported by substantial evidence" in the Wunderlich statute. Defendant also relies on certain references in House Report 1380 on S. 24, to section 10 of the Administrative Procedures Act, and to the decision of the Supreme Court in *Consolidated Edison Co., et al.* v. *National Labor Relations Board et al.*, 305 U.S. 197.

The word "review" when used in statutes does not necessarily imply review in the appellate sense. For example, section 108 of the Renegotiation Act of March 23, 1951, 65 Stat. 7, 21, 50 U. S. C. § 1218, is entitled "Review by the Tax Court;" but the section itself provides for a redetermination of the very issues decided by the Renegotiation Board and not for a review of that Board's decision. See also the various ways in which the word "review" is used in the act of July 19, 1952, 66 Stat. 792, codifying the laws relating to the Patent Office.

While the expression "supported by substantial evidence" appearing in section 1 of the Wunderlich Act is normally found only in statutes conferring appellate jurisdiction or jurisdiction of a petition to review an administrative decision, the use of such expression without more does not amount to a definition of the scope of judicial review. Furthermore, the reference in House Report 1380 to section 10 of the Administrative Procedures Act covering judicial review of decisions of agencies[1] covered by that act does not warrant our reading into the Wunderlich Act provisions contained in the Administrative Procedures Act but not appearing in the Wunderlich Act.

Section 10 of the Administrative Procedures Act provides that the *findings of fact* supporting the decision under attack on appeal may be set aside by the appellate court if those findings of fact are not supported by substantial evidence. Section 10 then provides that in making the determination that a finding of fact is not supported by substantial evidence, the appellate or reviewing court shall review the whole record or any part thereof which, as earlier provisions of that act require, has been certified to the appellate court as the record on appeal. It is *this* portion of section 10 which defines and limits the "scope of review" by the appellate court and tells the appellate court that in deciding the issue of the finality of the administrative findings of fact it may look only to the record made at the administrative level. The Wunderlich Act contains no such provision telling the Court of Claims what evidence or record it shall consider in making its determination that the *decision* of a department head rendered in a contract dispute lacked finality because arbitrary, or not supported by substantial evidence, etc.

What then is the significance of the reference in the

[1] "Agencies" whose decisions are appealable under the Administrative Procedures Act are only those agencies which are neither parties to, nor employees of parties to, the disputes concerning which the decisions are being rendered. Decisions covered by the Wunderlich Act are decisions rendered by one of the parties to the dispute being decided or by employees of such party.

Report of the House Committee to section 10 of the Administrative Procedures Act and to court decisions interpreting that section? It is my opinion that Congress was merely calling attention to the various *standards* of finality provided for in the Wunderlich Act and comparing them with similar standards of finality provided for in section 10 of the Administrative Procedures Act. Nothing in the Committee Report justifies the conclusion that Congress was referring to the manner in which the Administrative Procedures Act requires appellate courts to make their determination as to whether or not those standards have been met. Furthermore, the specific reference to the *Consolidated Edison Company* case, *supra*, was merely for the purpose of noting the Supreme Court's decision of what constitutes substantial evidence, i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" as distinguished from a mere scintilla of evidence, and not for the purpose of indicating to the Court of Claims that, although the act it was passing did not specifically so require, the court might look only at the evidence relied on by the department head when the court decided the issue of whether the decision of that department head was or was not arbitrary or supported by substantial evidence.

Under the Administrative Procedures Act it is clear that the appellate court must find the "evidence" referred to in the administrative record which the Administrative Procedures Act itself requires in earlier provisions to be made and to be certified to the appellate court on the appeal. Neither the contract in suit nor any statute of which I am aware, including the Wunderlich Act, requires the making of an administrative record in connection with the rendering of a decision by a department head concerning a dispute arising under the contract. In the generally accepted sense, such an "administrative record" does not exist in connection with any contract claim sued on in the Court of Claims. Congress could have required the making of such an administrative record and some such idea was actually considered by the 82d Congress when it was studying the legislation in question. See H. R. 6404, 82d Cong., 2d Sess., to

amend the Administrative Procedures Act to cover decisions rendered in Government contract disputes. In the course of the hearings, suggestions were made concerning the possibility of establishing an independent administrative tribunal to consider disputes arising under Government contracts where decisions would be judicially reviewable on appeal.

Since, presumably, all the facts and circumstances of a contract dispute are within the knowledge of the two contracting parties, the Government contracting party renders its decision on the basis of that knowledge. Congress was aware of the fact that some contracting agency heads delegate their contract obligation to reach a decision on a dispute arising under the contract to a board of employees, and that such a board then attempts to reduce that knowledge to some sort of written record. Congress also knew that other contracting agency heads render their decisions without the aid of any such "record." Congress knew how to legislatively require the making of a record, affording the parties to the dispute administrative due process, and also it knew how to make the decision based on such a record reviewable on appeal. A reading of the Administrative Procedures Act and the Indian Claims Commission Act which do precisely that, indicates that it requires considerably more legislation than was indulged in in the Wunderlich Act.

The dissenting opinion herein, which agrees substantially with the position taken by the defendant, suggests that a plaintiff contractor should be permitted to adduce evidence in this court in addition to evidence produced before the department head *only* upon a showing that adequate opportunity to make a complete record before the department head was not afforded by the contracting agency. When Congress has wished to confer jurisdiction on a court to review a final decision of an executive agency and to provide for the usual appellate review on the basis of a record made below, and in addition has wished to provide for the taking of additional testimony upon a showing by the aggrieved party that, due to no fault of his own, he was unable to produce an adequate record at the agency level, Congress has done so in detail,

as in the act of December 29, 1950, 64 Stat. 1129, 5 U. S. C. §§ 1031-1042. See particularly section 7 of that act. I find no such provision in the Wunderlich Act.

Certain bills were introduced in the Congresses which were considering the Wunderlich legislation and which did purport to change this court's jurisdiction over contract claims. See S. 2432, 82d Cong., 2d Sess.; H. R. 6214, 82d Cong., 2d Sess.; H. R. 6301, 82d Cong., 2d Sess.; H. R. 6338, 82d Cong., 2d Sess.; and H. R. 3634, 83d Cong., 1st Sess., all of which bills proposed amendments to the Judicial Code as it relates to the jurisdiction of the Court of Claims in contract claims.

If the Wunderlich Act does not alter or limit in any way this court's jurisdiction over Government contract claims, what then does it do? It is my opinion that the Wunderlich Act is an express statutory limitation on the right of any Government contracting agency to contract for the absolute finality of its decisions rendered in connection with disputes arising under the contract, whether of fact or of law. Such statutory limitations on the authority of Government contracting agencies become by operation of law a part of any Government contract containing a so-called disputes provision whether the disputes clauses in such contracts contain the statutory language of limitation or not.[2] See *Hooe* v. *United States*, 218 U. S. 322. The precise limitations imposed on the Government contracting agencies by the Wunderlich Act are the identical ones implied by the courts prior to the decision of the Supreme Court in the *Wunderlich* case when the courts were called upon to inter-

[2] In resisting the passage of this legislation, some of the contracting agencies informed the Congress in the course of committee hearings that they were prepared to amend the disputes clauses in their contracts to provide that only those decisions would be final which were not arbitrary, capricious, grossly erroneous, fraudulent or not supported by substantial evidence, and I understand that some disputes clauses now contain that language. Congress, however, noted that without legislation making such limitations on finality mandatory, any Government agency could revert to the old type of disputes clause at any time and that such old standard form disputes language would have to be interpreted by the Court of Claims and the District Courts in conformity with the interpretation of the Supreme Court of that clause in the *Wunderlich* case.

pret the meaning of the standard form disputes clause which, by its literal language, accorded absolute finality to any sort of decision rendered by a department head on a dispute arising under the contract.

Insofar as the dispute arising under a Government contract involves a question of law, the statutory limitation in the Wunderlich Act amounts to a positive prohibition against the Government's contracting for *any* finality regarding its decisions. Insofar as the dispute involves a question of fact, the Wunderlich Act limits all Government contracting agencies' authority to contract for the finality of their decisions to those decisions which are honest, fair, accurate and supported by all the relevant facts and circumstances involved in the dispute.

I am of the opinion that because the Wunderlich Act is a statutory limitation on the authority of all Government contracting agencies to contract for the finality of their decisions on disputes arising under their contracts, that act leaves unchanged the jurisdiction of this court over Government contract claims. Furthermore, I think the act provides no basis whatsoever for requiring either plaintiff or defendant to produce or rely on the so-called record on which the head of the contracting agency chose to base his decision, required of him under the contract in suit. Insofar as that "record"[3] consists of a transcript of testimony taken before a "board" representing the head of the contracting agency concerned in the dispute, that record is simply "former testimony" which may or may not be admissible in evidence under the usual rules of evidence as the commissioner of the court may rule on the trial of the case. See *Wong Wing Foo* v. *McGrath*, 196 F. 2d 120. Naturally, if both parties are satisfied with that record and are willing to have the court decide the issue of finality of the decision of the department head on the basis of that

[3] "Administrative records" and "administrative decisions" usually relate to decisions and record which an agency is *by law* required to make. In contract suits in this court the decision of the department head is not required by any statute but rather by the terms of the contract itself and the making of a record to support that decision is purely optional with the department head.

record rather than on a new record made in this court, there would seem to be no objection to such a proceeding. See *Langoma Lumber Corp.* v. *United States*, 140 F. Supp. 460, aff'd. 232 F. 2d 886.

LARAMORE, *Judge*, dissenting:

I respectfully dissent.

Because of the unsettled nature of this type of controversy, I believe the case should be referred back to a commissioner of this court for further proceedings. However, as a guide to the commissioner and the litigants in this case, I believe a discussion of the finality of the administrative decision intended under the Act of May 11, 1954, *supra*, would be appropriate.

I do not believe that Congress intended by the language in the Act of May 11, 1954, *supra*, "shall be final and conclusive unless the same is fraudulent * * *," to make the decision of the administrative board final subject only to the usual administrative review such as that provided in the Administrative Procedure Act, 60 Stat. 237, because of the lack of procedural due process afforded by the Appeals Board.

However, I believe a common sense application of the Act of May 11, 1954, *supra*, considering the background of the legislation and the administrative procedures available to aggrieved contractors, would be to apply the usual administrative review rule and determine the question of arbitrariness, etc., and lack of substantial evidence on the record made before an appeals board, unless the contractor alleges and proves that because of the procedures available in the Appeals Board as applied to him, he was unable to adequately present his case. That is to say, because of the failure of the Government to produce documents or witnesses or inability of the plaintiff to compel the attendance of witnesses or other procedures that would prevent plaintiff from adequately establishing material facts with reference to his claim, or if the board considered evidence not in the record. Further, he must allege and prove the additional material facts which were not before the board.

Because of the failure of the plaintiff to put the record of the Appeals Board in evidence, it is impossible for this court to determine whether the decision of the Appeals Board was arbitrary, etc., or not supported by substantial evidence. If the plaintiff desires the court to go beyond the record of the Appeals Board in deciding whether it is entitled to recover, it must amend its petition and allege and prove the facts above outlined.

I would refer the case back to a commissioner of this court in conformity with the above dissenting opinion.

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